Russelton Medical Group, Inc. *and* United Steelworkers of America, AFL–CIO–CLC. Case 6–CA–21641

April 30, 1991

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS CRACRAFT AND OVIATT

On September 14, 1990, Administrative Law Judge Robert W. Leiner issued the attached decision. The General Counsel and the Charging Party filed exceptions and supporting briefs. The Respondent filed exceptions and an answering brief to the exceptions of the General Counsel and the Charging Party.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions, for the reasons set forth below, and to adopt the recommended Order.

The complaint alleges that the Respondent is the successor employer to HMO of Western Pennsylvania, Inc. (HMO), and that, as the successor employer, the Respondent violated Section 8(a)(5) by refusing to recognize and bargain with the Union. The judge dismissed the complaint, finding that the Respondent is not the legal successor to HMO and that the Respondent was under no obligation to recognize and bargain with the Union. Although we agree that the complaint must be dismissed, we do so because we find that the Respondent's employees do not constitute an appropriate bargaining unit.[1]

Shortly after the Respondent took control of HMO's medical clinic operations, the Union sought recognition in a unit of the Respondent's ''full-time and regular part-time service, maintenance and technical employees; and registered, graduate or professional nurses.'' The unit, which includes professional and nonprofessional employees, has been covered by a series of collective-bargaining contracts between the Union[2] and several employers which have operated the medical clinics since the 1960s.[3] The parties to the contracts have enjoyed a long history of uninterrupted collective bargaining with no objection to the unit raised by any party. However, the professional employees were never accorded the opportunity of a separate vote to determine if they wished to be included in the combined unit.

The Respondent has not agreed to the combined unit. There has been no Board certification of the unit and no history of collective bargaining between the Respondent and the Union. The Respondent challenges the unit's appropriateness.

The appropriateness of the combined unit is an issue the Board must decide. If we were to order the Respondent to bargain with the Union as the representative of the employees in this unit, we would, in effect, be deciding that a unit including professional and nonprofessional employees is appropriate. Section 9(b)(1) prohibits such a finding ''unless a majority of [the] professional employees vote for inclusion in [the] unit.''[4] There has been no such vote in this case. Under these circumstances, we find that the combined unit of professional and nonprofessional employees does not constitute a unit appropriate for collective bargaining, because the professional employees have never been given the opportunity to decide if they wish to be included in this unit.[5] It follows, therefore, that the Respondent's refusal to recognize and bargain with the Union did not violate Section 8(a)(5) of the Act.[6] Accordingly, we shall dismiss the complaint.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

Julie R. Stern, Esq., for the General Counsel.
Charles R. Volk, Esq. and *Susan Brahm Gunn, Esq. (Volk, Frankovitch, Anetakis, Recht, Robertson & Hellerstedt)*, of Pittsburgh, Pennsylvania, for the Respondent.
Rudolph L. Milasich, Esq., of Pittsburgh, Pennsylvania, for the Charging Party.

DECISION

STATEMENT OF THE CASE

ROBERT W. LEINER, Administrative Law Judge. This matter was heard on January 11 and 12, 1990, in Pittsburgh,

[1] Thus, we find it unnecessary to address the successorship issue.

[2] The United Mineworkers of America, District 50, was the original collective-bargaining representative of the unit employees. In the 1970s, UMWA District 50 was merged into the United Steelworkers of America which, through its Local 14077, became the employees' collective-bargaining representative.

[3] The clinics were created by the United Mine Workers of America and were operated by the Union's legal entity called Miners Clinic, Inc. (MCI). In 1985 MCI merged with a competing local health maintenance organization to form HMO of Western Pennsylvania, Inc. (HMO). At all times since the creation of the clinics, physican members of the Respondent have provided medical services to the clinics' patients.

[4] *Renaissance West Mental Health Center*, 276 NLRB 441, 444 (1985).

[5] As the judge observed, Sec. 9(b)(1) does not make combined units unlawful per se ''where the unit was voluntarily created by the parties and maintained by them for many years without challenge.'' See *St. Luke's Hospital Center*, 221 NLRB 1314, 1315 (1976). *Gibbs & Cox*, 280 NLRB 953 (1986), in which the Board found an 8(a)(5) violation for withdrawing recognition from a union representing a voluntarily recognized mixed unit, does not compel otherwise. In *Gibbs & Cox*, the Board held that it was not ''initially establish[ing]'' a unit, but merely recognizing what the parties had long established. Id. at 955 fn. 12 and 968. In the instant case, the Respondent has never agreed to the combined unit. Thus, we cannot avoid the need to decide the unit issue by accepting the parties' actions.

[6] Member Oviatt agrees with the judge that the Respondent is not a successor employer to HMO. As did the judge, he would dismiss the complaint on this ground. Accordingly, he would not reach the appropriate unit question addressed by his colleagues.

Pennsylvania, on the General Counsel's complaint, as amended,[1] alleging, in substance, that Respondent, Russelton Medical Group, Inc., violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union, United Steelworkers of America, AFL–CIO–CLC (the Union), as the statutory bargaining representative of an appropriate unit of employees, Respondent being the legal successor to a predecessor's obligation to bargain. Respondent's answer and amended answer denies various allegations of the complaint, pleads several affirmative defenses and denies the commission of any unfair labor practices.

At the hearing, all parties were represented by counsel, given full opportunity to call and examine witnesses, submit oral and written evidence, and to argue on the record. At the close of the hearing, counsel waived final argument and reserved the right to submit posthearing briefs. Thereafter, the parties, through counsel, submitted timely posthearing briefs, all of which have been carefully considered.[2]

On the entire record, including the briefs, and from my particular observation of the demeanor of the witnesses as they testified, I make the following

FINDINGS OF FACT

I. RESPONDENT AS STATUTORY EMPLOYER

Respondent, Russellton Medical Group, Inc., admits that at all material times, it has been a Pennsylvania professional corporation with an office and place of business in New Kensington, Pennsylvania, where on an annual basis, it has purchased and received at the New Kensington facility, products, goods, and materials valued in excess of $50,000 shipped directly from points outside the Commonwealth of Pennsylvania. Respondent concedes, and I find, that at all material times, it has been and now is an employer engaged in commerce within the meaning of Sections 2(2), (6), and (7) of the Act.

II. THE UNION AS STATUTORY LABOR ORGANIZATION

The complaint alleges, Respondent admits, and I find, that the United Steelworkers of America, AFL–CIO–CLC (the Union) has been and is, at all material times, a labor organization within the meaning of Section 2(5) of the Act. Respondent asserts, however, that it believes that the Union's Local 14077, a signatory to the collective-bargaining agreement with Respondent's predecessor (HMO of Western Pennsylvania Inc.) no longer exists and that there is no obligation to bargain. In view of the disposition below, I find it unnecessary to reach or resolve whether Local 14077, signatory to the predecessor's collective-bargaining agreement, exists.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

All parties are in agreement that the pleadings and evidence present two issues for resolution:

(1) Whether Respondent is a successor employer to HMO of Western Pennsylvania, Inc.

(2) Whether, as a successor employer, Respondent violated Section 8(a)(1) and (5) of the Act by refusing to recognize and bargain with the Union as the exclusive collective-bargaining representative of its employees in an appropriate unit.

In the 1960s, the United Mine Workers of America created (in the Pittsburgh, Pennsylvania area) in and about New Kensington, Pennsylvania, a central medical facility surrounded by three smaller, satellite facilities. These facilities provided outpatient medical services to persons entitled to use the clinic, including fee-for-service patients and persons insured for such services. The legal entity operating these clinics was Miners Clinic, Inc. The central facility was located at New Kensington, Pennsylvania; the ''satellites'' being at North Apollo, Penn-Plum (Penn Township) and Russellton. Miner's Clinic Inc. (MCI) engaged a group of physicians to render various medical services at the above locations to out-patients. The physicians were all members of Russellton Medical Group, Inc. (RMG), a professional corporation formed in the early 1950s. At no time, from the formation of RMG in the 1950s until January 1, 1989, did it have employees or members other than physicians. While the New Kensington facility, the largest of the facilities, contained MCI's business office, MCI furnished RMG with all medical equipment and staff necessary for the rendering of outpatient services at the New Kensington and satellite clinics.

Sometime, apparently in the 1960s, MCI recognized the United Mineworkers of America (UMWA) District 50, as the collective-bargaining representative of all the following unit of employees at the several locations:

> All full-time and regular part-time service, maintenance and technical employees; and registered, graduate or professional nurses at the New Kensington, North Apollo, Penn Township and Russellton facilities; excluding supervisors, other professional employees and guards as defined in the Act.

Sometime in the 1970s, UMWA District 50 was merged into the United Steel Workers of America which, with and through its Local 14077, became the collective-bargaining representative of the employees in the above-described unit. Thereafter, this unit was covered by a series of collective-bargaining agreements between MCI and the Union.

In the early 1980s, there existed another competing local health maintenance organization, Alle-Kiski Valley Health Plan. In November 1985, this organization was merged with MCI into a new health maintenance organization, HMO of Western Pennsylvania, Inc. (HMO). RMG, without interruption of services, continued to provide medical services to the merged organization at the above locations, HMO having purchased the various clinics, including all equipment. Thus HMO continued to deal, as its predecessors had, with RMG, the provider of medical services, and continued, without hiatus, to provide it with equipment, personnel, and real estate,

[1] The underlying unfair labor practice charge was filed and served on March 3, 1989. The complaint and notice of hearing is dated September 26, 1989. Subsequent to Respondent's timely answer of October 6, 1989, the General Counsel issued an amendment to the complaint which was filed and served on December 11, 1989. Respondent filed a further answer.

[2] Attached to the General Counsel's brief is a motion to correct the transcript with regard to various typographical and spelling errors. No response having been received from either the Charging Party or Respondent, the General Counsel's motion to correct the transcript is granted.

and to recognize the Union as the collective-bargaining representative of its employees in the above unit.

After about 3 years, HMO ran into economic difficulties and was closed by the Pennsylvania Insurance Commissioner at the end of December 1988. At that time, a partnership, Alle-Kiski Properties, purchased the real property, facilities, and equipment theretofore owned by HMO. Alle-Kiski Properties consisted of a general partner, St. Margaret's Hospital, and several limited partners. Among the limited partners were members of RMG.

Although HMO closed and ceased its operations on December 31, 1988, the operation of the clinics and the dispensing of medical services continued without hiatus. On January 1, 1989, RMG leased space from Alle-Kiski Properties, assumed control of the operation and commenced employing nonphysician employees. By January 15, 1989, RMG employed, other than physicians, about 38 employees in nonsupervisory positions at the several locations. Of the 38 employees hired, 36 were former HMO employees. It also hired as its supervisors 2 of the 16 supervisors who had previously been employed by HMO.

On January 26, 1989, the Union requested recognition and bargaining in the above unit and Respondent refused.

Although the underlying facts are not in dispute, the parties disagree, inter alia, concerning the inferences to be drawn from those underlying facts concerning the first question, posed above, of whether RMG, commencing January 1, 1989, is the legal successor of HMO.[3]

Respondent concedes that there are certain factual elements which are adverse to its position (R. Br. 10) concerning successorship:

> (a) Although RMG employs approximately 40 bargaining unit employees and HMO had 140, the great majority of the approximately 40 had been HMO employees.
>
> (b) Although there are far fewer RMG doctors and these fewer doctors render only primary care disciplines, most of the RMG physicians had provided medical care to HMO patients.
>
> (c) Respondent operates out of the same facilities formerly owned by HMO.
>
> (d) Although HMO had a broad range of social functions and RMG did not, the primary job of both employers was the delivery of patient care services.

Respondent further argues that the existence of these parallels or similarities are not fatal to its argument that RMG is not the legal successor of HMO under Board doctrine. In furtherance of its position, Respondent argues that:

(1) The business of RMG and HMO is not the same.

(2) The job duties, working conditions, wages, and supervisors of RMG's employees are significantly different from those of HMO.

(3) RMG does not have the same body of customers as the HMO.

(4) RMG's employees have no reasonable expectation of continued representation.

Respondent argues, under the Supreme Court's position in *Fall River Dyeing Corp.*, 482 U.S. 27 (1987), that an analysis of the jobs, working conditions, supervision, the business of the two entities, the services provided by the two entities, and the customers served, demonstrate such a lack of identity as to foreclose the existence of RMG as the legal ''successor'' of HMO.

On the other hand, the General Counsel and the Union argue[4] that RMG's business, compared to HMO, has remained virtually unchanged notwithstanding that RMG's operation of the clinics is on a smaller scale than that of HMO. In addition, they assert that the changes in employee functions are superficial; that from the perspective of the employees, the nature of the business, and rendering outpatient medical care, remains the same. And the fact that the physicians are now essentially in private practice and no longer are rendering services designed for the elderly and the indigent (through Medicare and otherwise) is not decisive (Tr. 187–189).

B. *Jobs and Job Duties*

RMG concedes that of the approximately 38 original employees it hired on or immediately after January 1, 1989 (its first day of operation, thus without any hiatus flowing from HMO's demise) the great majority (36) were former HMO employees (R. Br. 10). HMO had about 140 unit employees. The evidence shows that there were no less than 44 HMO job classifications (G.C. Exh. 2, app. A) but only about 10 or 11 under RMG (G.C. Exh. 6).

Comparing the classifications of the two entities, HMO and RMG both employ nurses, medical aides, billing clerks, medical records clerks, medical transcriptionists, secretaries, X-ray technicians, clerks, switchboard operators, and receptionists. Unlike HMO, RMG does not employ housekeepers, laboratory aides, darkroom technicians, home health aides, registrars, supply aides, licensed practical nurses, pulmonary function aides, messengers, laboratory technicians, data processing clerks, pulmonary function technicians, community workers, enrollment representatives, maintenance engineers, bacteriology technicians, home care planners, and other classifications. Nor are these job functions performed by any of the RMG employees. At present, there is no RMG laboratory on the premises. A part-time hospital employee does blood tests which are analyzed at a hospital. Under HMO, 7–10 HMO employees did all lab work on site (Tr. 417–418).

Only two former HMO unit employees, later hired by RMG, testified: Margie Pisano, for the General Counsel; Alberta Altmeyer, for Respondent.

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[3] The parties, in addition, are not in conflict concerning the applicable legal principles in determining whether RMG is HMO's ''successor'' within the meaning of the Act. Thus the parties are fully aware of Board and court precedent, including *Fall River Dyeing Corp. v. NLRB*, 482 U.S. 27 (1987); *NLRB v. Burns Security Services*, 406 U.S. 272 (1972); *Hospital San Francisco*, 293 NLRB 171 (1989); *Indianapolis Mack Sales & Service*, 288 NLRB 1123 (1988); *NLRB v. Hudson River Aggregates, Inc*., 639 F.2d 865, 869 (2d Cir. 1981); *Jeffries Lithograph Co.*, 265 NLRB 1499 (1982); *Woodrich Industries, Inc*., 246 NLRB 43 (1979); and *Morton Development Corp*., 287 NLRB 385 (1987). (Remanded in *Hospital Employees, District 1199P v. NLRB*, 864 F.2d 1096 (3d Cir. 1989).) The recent *Capitol Steel & Iron Co*., 299 NLRB 484 (1990), a full exploration of the issue of ''successorship,'' as the latest Board interpretation, must be given particular weight.

[4] To the extent that the Union in its brief (p. 14), speculates that RMG may have been, and still is, all along the historical bargaining, the ''joint employer'' of unit employees, such assertion is rejected. Neither the General Counsel's pleadings, theory of the case, nor brief, mention RMG's joint employer status. Predicating any statutory RMG liability on that wholly distinctive theory, unpleaded and unlitigated, would deprive RMG of due process. It is therefore rejected. *Indianapolis Mack Sales*, supra.

Pisano had been employed by HMO's predecessors since 1979. Although she had primarily been a receptionist at the Penn-Plum satellite, her job for HMO for a year before its demise was as a full-time New Kensington housekeeper. As 1 of 15 receptionists, she had worked principally at Penn-Plum but, on an irregular basis, was assigned by Receptionist-Manager Doka to New Kensington and the other satellite offices (Tr. 75). With the demise of HMO, she applied for receptionist jobs at New Kensington and Penn-Plum by submitting applications to the physicians working at those locations. She was interviewed by Dr. Merenstein before the HMO demise and was hired by RMG as a part-time receptionist/aide at Penn-Plum by Dr. Merenstein.

While she had been a full-time HMO housekeeper doing only janitorial work only at the New Kensington facility for the year prior to the demise of HMO, she was taking blood pressures, EKGs, pulses, and temperatures as a receptionist/aide for RMG.[5] Her receptionist duties, entirely clerical, are the same at RMG as they were at HMO (Tr. 81). Her medical aide duties are entirely different. At RMG, she is apparently always on call as a receptionist or medical aide if necessary to replace another employee (Tr. 47).

As an HMO receptionist at Penn-Plum, she had been supervised by Receptionist-Manager Doka from the main office at New Kensington who directed her scheduling, hours, and place of work (Tr. 74–75). At RMG, her sole supervisor and ''boss'' (Tr. 49) is Dr. Merenstein (both as a medical aide and receptionist) who set her terms and conditions of employment, including the particulars of job performance (Tr. 233–234). When applying for employment at RMG she did not even inquire for holidays or benefits. There are no benefits (vacations and holidays) at RMG (Tr. 69).

Roberta Altmeyer, Respondent's witness, had been employed as a registered nurse by HMO (and its predecessors) since 1972 and was a unit member and a union member.[6] At the HMO, she was paid by the hour, paid for overtime, and was supervised and scheduled by the director of nursing at New Kensington who assigned her to various physicians in order to fill in for sick or vacationing nurses and, on occasion, when her regular physician was absent (three mornings per week). Her regular job was as a specialist surgical nurse for Dr. Jonathan Swartz at New Kensington. She did not perform surgical nursing duties, for instance, when assigned to assist an internist (Tr. 528).

With the demise of HMO, Dr. Swartz asked her to work for him. She agreed, filled out an RMG application, was interviewed by Dr. Swartz who set here salary (no longer hourly paid) and benefits. She is no longer paid overtime. She works only for Dr. Swartz and no longer works the irregular HMO hours demanded by emergency duty (Tr. 532–533). She no longer fills in for other nurses and no longer has the HMO holidays and benefits. She has become a part-time supervisor; 2 half-days per week.

[5] She received her medical training before being hired by RMG in January 1989, at a vocational training school and in high school. She did no such medical work for HMO whether as a receptionist or housekeeper (Tr. 73).

[6] The long-recognized historical unit, as above noted, includes ''registered . . . or professional nurses . . .; excluding . . . other professional employees.'' The Act forbids the Board (Sec. 9(b)(1)) to ''decide that any unit is appropriate . . . if such unit includes both professional employees and [non-professionals] unless a majority of such professional employees vote for inclusion in such unit.'' Indeed, Respondent defends, inter alia, its refusal to recognize and bargain with the Union precisely on this ground: that there has never been an election (*Sonotone Corp.*, 90 NLRB 1236 (1950)), in which the professional nurses have had an opportunity to vote on their inclusion in the unit. The Board, however, has taken the position that such a unit, established by the parties, is not unlawful. Nor does *Leedom v. Kyne*, 358 U.S. 184 (1958), hold to the contrary. See generally *Corporacion de Servicos Legales*, 289 NLRB 612 (1988).

C. *Successorship*

The approach the Board and courts must take in analyzing the existence of a ''successorship'' (constituting the threshold question before reaching the issues whether the successor is obligated to bargain and violated any such obligation) is stated at length in *Fall River Dyeing Corp. v. NLRB*, 482 U.S. 27, 43–44:

> In *Burns* we approved the approach taken by the Board and accepted by courts with respect to determining whether a new company was indeed the successor to the old. 406 U.S., at 280–281, and n. 4. This approach, which is primarily factual in nature and is based upon the totality of the circumstances of a given situation, requires that the Board focus on whether the new company has ''acquired substantial assets of its predecessor and continued, without interruption or substantial change, the predecessor's business operations.'' *Golden State Bottling Co. v. NLRB*, 414 U.S., at 184. Hence, the focus is on whether there is ''substantial continuity'' between the enterprises. Under this approach, the Board examines a number of factors: whether the business of both employers is essentially the same; whether the employees of the new company are doing the same jobs in the same working conditions under the same supervisors; and whether the new entity has the same production process, produces the same products, and basically has the same body of customers. See *Burns*, 406 U.S., at 280, n. 4; *Aircraft Magnesium, a Division of Grico Corp.*, 265 NLRB 1344, 1345 (1982), enf'd, 730 F.2d 767 (C.A. 9 1984); *Premium Foods, Inc.*, 260 NLRB 708, 714 (1982) enf'd, 709 F. 2d 623 (C.A. 9 1983).
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> In conducting the analysis, the Board keeps in mind the question whether ''those employees who have been retained will understandably view their job situations as essentially unaltered.'' See *Golden State Bottling Co.*, 414 U.S., at 184; *NLRB v. Jeffries Lithograph Co.*, 752 F.2d 459, 464 (C.A. 9 1985). This emphasis on the employees' perspective furthers the Act's policy of industrial peace. If the employees find themselves in essentially the same jobs after the employer transition and if their legitimate expectations in continued representation by their union are thwarted, their dissatisfaction may lead to labor unrest. See *Golden State Bottling Co.*, 414 U.S., at 184.

With the admonition that the factual inquiry emphasize the ''employees' perspective'' (do the employees hired by the alleged successor ''understandably view their job situations as essentially unaltered'') and the ultimate issue being whether there is ''substantial continuity'' between the enterprises, the

Supreme Court stated that the factors on which a conclusion of ''successorship'' rests must include:[7]

> (1) whether the business of both employers is essentially the same;
> (2) whether the employees of the new company are doing the same jobs in the same working conditions under the same supervisors; and
> (3) whether the new entity has the same production process, produces the same products and basically has the same body of customers.

In *Fall River Dyeing*, supra at 44, the Court agreed with the Board that its ''substantial continuity'' and ultimate ''successorship'' findings were supported in the context of that manufacturing situation:

> Petitioner acquired most of Sterlingwale's real property, its machinery and equipment, and much of its inventory and materials. It introduced no new product line. Of particular significance is the fact that, from the perspective of the employees, their jobs did not change. Although petitioner abandoned converting dyeing in exclusive favor of commission dyeing, this change did not alter the essential nature of the employees' jobs, because both types of dyeing involved the same production process. The job classification of petitioner were the same as those of Sterlingwale; petitioner's employees worked on the same machines under the direction of supervisors most of whom were former supervisors of Sterlingwale. The record, in fact, is clear that petitioner acquired Sterlingwale's assets with the express purpose of taking advantage of its predecessor's work force.

In the healthcare institutional context, the same elements must be examined to determine successorship:

Whether the business and supervisor establishments of both employers are essentially the same:

Having conceded, above that there are elements which at least superficially support a successorship finding, Respondent urges that its concessions are not fatal to its defense, arguing that there is no ''essential'' similarity between predecessor and alleged successor.

(a) Whereas HMO, using RMG's 25 physicians in various specialities[8] was a highly regulated (state and Federal) Health Maintenance Organization the scope of whose services, the makeup of its board of directors, capitalization, and charge rates were all subject to state supervision, RMG is merely a medical corporation which agreed to have its 12 remaining physicians provide medical services of a much more limited nature than that provided by RMG for HMO. Since the RMG operation was no longer a health maintenance insurance program there was no longer the Federal and state scrutiny accorded to such organizations and its operations.

(b) The HMO was essentially an insurance company underwriting principally prepaid medical services. As such, it governed through a board of directors, none of whom were RMG physicians (although an RMG member was its medical director). The board of directors actively participated in management so as to maintain a viable organization (Tr. 268) and oversaw the marketing, medical, personnel, and other staff functions. The executive director of the HMO was the ultimate supervisor over departmental supervisors and directors in finance, sales, planning, and services, etc. These departmental supervisors scheduled the work of the departmental employees. The director of nursing scheduled the registered nurses.

The RMG, on the other hand, maintains a goard of governors, all of whom are physicians, which does not oversee the medical and personnel operations at the medical facilities.

(c) The HMO maintained 16 supervisors in the various departments with a centralized billing, work assignment, and personnel program conducted from the New Kensington facility. RMG employs only two supervisors, both of whom were HMO supervisors. Supervisor Wiant became RMG' ''Practice'' manager (i.e., executive director) and Supervisor Talotta continued as RMG's billing supervisor. Wiant's actual supervisory functions at HMO was not entirely clear on this record. Her present RMG supervisory functions (i.e., personnel functions) however, relate only to RMG's New Kensington facility where she supervises 15 employees; receptionist, medical records clerks, medical transcriptionists, and switchboard operators. Her business functions, including payroll, accounting, and recordkeeping relate to the four satellite facilities as well.

Commencing with the demise of HMO and commencement of the January 1, 1989 RMG operation, the registered nurses were no longer hired, scheduled (by rotation at New Kensington and the four satellites) and supervised by a New Kensington director of nursing; rather the nurses were directly hired and supervised by individual RMG physicians at the several facilities. They were now salaried rather than paid by the hour. They were no longer subject to shift and geographical rotation but worked solely for the particular physician at one place. In addition, the individual physician now hired and directly supervised his own nurses aides, medical records technicians, and medical transcriptionists for whom the RMG physician set wage scales and scheduling. These functions, centralized at New Kensington under HMO, had changed. Under HMO, the RMG physicians had no supervisory authority over HMO employees. In particular, the RMG physician, under HMO, was unable to select the nurse assigned to his facility and, on occasion, his request for a particular nurse was not met. In at least one RMG facility, the nurse is now a part-time supervisor.

(d) The hours of operation (and the resulting scheduling and functioning of the employees) changed with the demise of HMO. RMG now works 5 days per week, ending at 5 or 6 p.m. on Friday. HMO worked to 11 p.m. during the week with Saturday and Sunday hours between 1 and 5 p.m. Per-

[7] The Supreme Court found not ''determinative'' the manner in which the alleged successor acquired the assets of the predecessor. Nor does the reduction in the successor's relative size so change the nature of the successor as to defeat the employees' expectations in continued union representation, *Fall River Dyeing*, supra at 46 fns. 11 and 12. Moreover, since the employee perspective is stressed, it is difficult to rationalize the materiality of the same corpus of customers in the Supreme Court's enumeration of pertinent factors even to the question of the similarity of the business. The employees are ordinarily unconcerned to whom the product is sold.

[8] The 25 RMG physicians provided HMO with medical services in OB/GYN, rheumatology, dermatology, urology, opthamology oncology, neurology, orthopedics, pediatrics, internal medicine, general surgery, and allergy. With the closing of the HMO on December 31, 1988, the RMG physicians, commencing January 1, 1989, offered services only in pediatrics, family practice, internal medicine, general surgery, and allergy. The former services no longer rendered were offered to outside specialists by RMG.

sonnel were rotated to meet these nightly and weekend schedules. Under HMO, the RMG physicians, by contract, were obligated to provide emergency services, 7 days per week, 24 hours per day. RMG physicians, in each office, now set their own hours. There is no medical emergency service obligation.

(e) In addition to abandoning various medical functions RMG no longer has the following HMO health services and business functions: audiology, health education, home health services laboratory, podiatry, and physical therapy. There no longer is a social services department or personnel department, nor a claims processing, or quality assurance and utilization program. The mental health services department housekeeping and maintenance and numerous other HMO functions and programs, together with their employees, no longer exist.

(f) As a result of this change in operations, the RMG physicians are no longer paid a contractually guaranteed annual salary by HMO; each now derives a livelihood based on the net revenues resulting from subtracting expenses of his own facility from gross operating revenue. The HMO patients were principally not under a fee-for-service basis of payment. The present RMG patients are 90-percent fee-for-service payors (Tr. 190). The same job titles and classifications (*medical aide* and *medical records clerk*) at HMO and RMG nevertheless have different substantive functions.

At HMO, the medical aide escorted the patient from the waiting room to the examining room, took and recorded temperatures and blood pressures, and gave the resulting chart to the physician. At the RMG, however, the medical aide interviews the patient, taking the history and the complaint; completes prescription blanks; under the nurse's direction, phones in medications to the pharmacy; gathers the medical records (X-rays, EKGs, and lab reports) for the nurse and is directed as to what action is to be taken. Indeed, on hiring, the medical aide is told that he/she is to perform any duty directed by the doctor. This differs from the HMO situation where the aide did not take patient histories, did not deal with records, had a clearly delineated job description and did not work at the doctor's discretion (Tr. 507). Unlike HMO duties, the aide assembles and records medical information derived from outside sources rather than recording their own nurse's notes into a chart (Tr. 406).

The medical records clerks also have changed duties. While they still pull and file patient charts, they no longer (as above noted) record chart information; that function having been transferred to the aides and the nurses themselves.

HMO patients consisted of employees of subscriber employers who chose and paid for the HMO for their employees (8000–9000); Medicare (2400 to 3000); Medicade (2000); and individual subscribers (1000). This total of about 14,000 (Tr. 260) potential patient paid a fee to an insurance company (HMO) to provide health care (Tr. 253). HMO hired a group of physicians (RMG) to render that care for these patients, continuing the relationship RMG had with HMO's predecessor (MCI). RMG agreed to provide out-patient medical services exclusively at HMO locations, with HMO providing all equipment and personnel (G.C. Br. 5). HMO owned the real property and equipment at the several locations. This property and equipment was sold to an independent third party (a limited partnership, Alle-Kiski Properties, Tr. 461)[9] at the demise of the HMO. RMG rents space at the several facilities from the new owner. RMG leases only space from the new owner and receives no services (Tr. 468–469) RMG occupies all of the old HMO satellites and space at New Kensington but not all of the space.[10] Independent physicians rent space directly from Alle-Kiski at the satellites and at New Kensington (Tr. 452–453) or are sublessees of RMG space. Referrals of RMG primary care patients for other medical services are no longer solely to RMG physicians which had been the required practice under HMO. Such referrals are now only 50 percent to former RMG-HMO physicians (Tr. 474).

At least in the case of RMG Dr. Elligator, he employs two part-time employees (a nurse and a medical aide) so that one of them is on duty at all times that he is there. These RMG employees are paid full time by RMG. The nurse spends 30 percent of her time ordering supplies for RMG. The aide works part time for Dr. Bass (an independent rheumatologist, Tr. 421) who reimburses RMG for her services and the services of the RMG medical transcriptionist. The independent physicians, of course, are not RMG members. Some bring their own staff of employees; some use, and reimburse for, part-time RMG employees (Tr. 421).

Under its service agreement with HMO, the RMG physicians had the opportunity of profiting from the successful yearly operations of HMO (U. Ehx. 3, p. 8, Notes to Financial Statement): 10 percent of the surplus resulting from subtracting from RMG's yearly revenue its expenses (including rent), was retained by RMG. Such a source of RMG revenue no longer exists.

Discussion and Conclusions

In the recent *Capitol Steel & Iron Co.*, 299 NLRB 484, a successor case involving steel mills, the Board observed that while each factor of the successorship test must be analyzed separately, the factors cannot be viewed in isolation; ultimately, the totality of the circumstances is determinative under *Fall River Dyeing*, supra. In particular, the Board seldom is presented cases where it must determine whether a bakery is the successor of a steel mill, *Capitol Steel & Iron*, supra at 488 fn. 12. A steel mill is a steel mill; a bakery is a bakery, *Good N' Fresh Foods*, 287 NLRB 1231 (1988); a tailor shop is a tailor shop, *Saks & Co. v. NLRB*, 634 F.2d 681 (2d Cir. 1980). Where the employee skills and functions remain the same and there is a carryover of supervisors, equipment, and physical workplace, and particularly where the work continues without hiatus, a finding of successorship ordinarily follows despite diminution in the size of the successor, variations in the product line, performance of additional tasks by the successor's employees, and similar changes; *Stewart Granite Enterprises*, 255 NLRB 569, 571 (1981), as noted in *Capitol Iron & Steel*, supra. In particular, size-related changes do not affect the employees' perception of their jobs and, if the putative successor is operating the predecessor's business ''in miniature,'' there will be a finding of successorship, *Capitol Steel & Iron*, supra.

[9] The general partner in the limited partnership of Alle-Kiski Limited Partnership is St. Margaret's Hospital located near Pittsburgh. The majority of physicians in the post-HMO RMG are limited partners in Alle-Kiski (Tr. 461).

[10] New Kensington consisted of two HMO owned and occupied buildings, only one of them is now partially occupied by RMG; the other stores old furniture and records for St. Margaret's (Tr. 415).

Finally, *Capitol Steel & Iron*, supra, again emphasizes that the *Fall River Dyeing* successorship criteria (whether the businesses are essentially the same; whether the new employer's employees are doing the same jobs, in the same working conditions, under the same supervisors; whether the new employer has the same production process, products, and customers) must be assessed primarily from the retained employees' perspective: whether they ''view their job situations as essentially unaltered.''

The predecessor, HMO, was an insurance company, whose structure, finances and functions were minutely subject to state and Federal regulation. It rendered prepaid health services through its employees and a contracted group of physicians (RMG). The unit employees were historically distinctly classified by pay and function under successive collective-bargaining agreements and were subject to many layers of centralized supervision out of New Kensington. Similarly, HMO maintained centralized billing and payroll procedures out of its New Kensington headquarters.

The demise of HMO led to RMG operating with the same centralized billing and payroll, in many respects using the same physical facilities and real estate. The physicians rendered the same quality of care for many of the same patients, notwithstanding that they now paid a fee for the particular services rather than having a prepaid program. The physicians were no longer guaranteed salaries by HMO contract. Though physicians' fees were pooled at RMG, there was no longer a guarantee. It is now a matter of no-fees-no-eat. Additional physician revenue in the form of contractual profit-sharing with HMO also was gone.

More important, there had also been changes in both the type of organization for which the employees worked and the jobs in which they worked.

The RMG now had employees, the great majority (36 of 38) of whom had been with HMO. Moreover, although the 40 odd classifications had been reduced to 10, they were the same outward classifications.

Though, under RMG, at New Kensington, 2 of the 16 HMO supervisors remained, and hired and supervised the 15 New Kensington receptionist, transcription, and switchboard employees (Tr. 114–115), there is no longer New Kensington's centralized supervision, administration, or control of RMG employees working at the satellites. Although there is evidence that Dr. Swartz' nurse now acts as a part-time supervisor at a satellite location, the only supervisors ordinarily functioning at RMG are the RMG physicians themselves. Thus, with the limited exception of Wiant's supervisory function over the 15 New Kensington employees, there are no ''supervisors'' at the three satellites: there is only the ''boss,'' i.e., each physician.

At HMO, the physician was not concerned with and did not hire, classify, establish wage rates and benefits, or schedule employees. The HMO employees looked to a centralized supervisory hierarchy in New Kensington for those functions; with the exception of the 15 unit employees at New Kensington, the majority of the RMG employees look solely to the physicians who employed them. And the RMG nurses at New Kensington, unlike their situations under HMO where there was a centralized New Kensington director of nursing, no longer have a supervisor other than the doctor. Wiant, supervisor over other erstwhile RMG New Kensington unit employees, does not supervise the erstwhile professionals (nurses) at New Kensington. In sum, a majority (21 of 36) of RMG's unit employees, employed in a majority of the RMG locations (the three satellites) are not supervised by any of the supervisors who were brought over by RMG. Furthermore, the two supervisors (Wiant and Talotta) even at New Kensington do not supervise all the classifications in the former HMO unit which were carried over, i.e., the nurses are no longer supervised from New Kensington.

After the demise of HMO, the RMG physicians individually solicited and received employment applications from prospective employees. They interviewed the employees and set the wages, hours, schedules, and other terms and conditions of employment. The erstwhile unit HMO nurses became salaried RMG employees. They no longer were paid overtime, worked for other doctors, or worked the HMO schedules (no further weekend or night hours). One took on supervisor duties. The medical aides no longer escort patients into consulting rooms, merely taking blood pressures, and temperatures. Now, they act as nurses in the absence of nurses; work part time for other physicians independent of RMG; interview patients for history and complaints; phone for medications; complete prescriptions; and gather medical records. The RMG employees, on hiring, were told that they were to perform any job they were directed to perform. The medical aides' jobs now includes strep tests, occult stools, drawing blood—all functions ''vastly broader than it was before'' (Tr. 507).

RMG employees, no longer centrally supervised, no longer have their hours of work and place of work determined out of New Kensington. They work at one place for one physician on a mutually agreed schedule.

In favor of a finding of successorship, despite the diminution in number of employees, supervisors, physicians, and services, *Western Freight Assn.*, 172 NLRB 303, 305 (1968), are factors relied on by the General Counsel and the Union, some of which are conceded by Respondent: the overwhelming majority of RMG employees were employed by HMO; RMG continues to operate clinics whose primary function is to render primary medical care on an outpatient basis; the two RMG supervisors had been among the 16 HMO supervisors; payroll and billing are still performed out of New Kensington; the same real property and facilities are used; RMG employees still take blood pressure and case histories as they did before; and many of the same patients have returned.

Furthermore, the fact that the physicians no longer are guaranteed a contractual salary and no longer enjoy a contractual profit-sharing plan may show a change in the nature of the business but are factors not showing a persuasive change in the workings of RMG when the employees' point of view is stressed.

Nevertheless, the Supreme Court's analysis requires that the legal conclusion of a ''substantial continuity'' between the enterprises be supported, inter alia, by findings that (1) the businesses are ''essentially the same''; and (2) that the employees in the putative successor are doing the same jobs in the same working conditions under the same supervisors. *Fall River Dyeing*, 482 U.S. 27, 43–44. While these two matters may elsewhere be conceptually separated, I find that in this setting they often merge. In any event, I am constrained by the facts to conclude that RMG is not HMO's legal successor.

I find that the businesses and jobs are different and that RMG's former HMO employees know that they are different. HMO was a highly centralized, heavily regulated, insurance enterprise which hired and supervised a broad spectrum of administrative, clerical, health service, and technical employees. It also hired the services of RMG's physicians. Because of centralized supervision and geographical reassignment, from the employee point of view, each employee was working for the HMO rather than for a doctor or even for a particular geographical HMO unit. It was not merely that HMO had centralized payroll and billing procedures—for RMG continued those convenient business devices. Rather, HMO's centralized supervisory structure at New Kensington ensured that employees looked to it for geographically changed assignments as well as scheduling, vacations, and all the elements governing the job and work place. Physicians were not supervisors. Furthermore, the particular jobs were highly delineated: HMO medical aides, for instance, had limited medical functions, not including such intimate nursing (i.e., professional) functions as taking patient's medical history, drawing blood, etc. HMO receptionists performed only clerical duties: answering phones and pulling patients' records for the physicians (Tr. 42). Any questions about the job were directed from the satellite receptionist to the receptionist supervisor in New Kensington (Tr. 41–42).

Working for RMG is different. The receptionist (Pisano) is also a medical aide. She was interviewed and hired by the doctor. He is the RMG supervisor. She works only at the satellite for the hiring physician as her ''boss.'' Thus, supervision as a condition of employment was significantly different. The carryover of two HMO supervisors working only at New Kensington, is irrelevant to satellite employees. Pisano cannot be assigned by Wiant to another work location.[11] She answers to no other supervisor. Her terms and conditions of employment were set by the hiring physician only—notwithstanding that RMG has guidelines on the terms of hiring. Nothing at the HMO resembled what a receptionist-aide does at RMG.

Nurse Altmyer tells new RMG employees that they are to perform whatever tasks they are assigned. As such, the medical aides (even part-time aides like Pisano) are performing medical tasks not performed by HMO aides. Her new job was different than anything at HMO (Tr. 72). Nurses have become salaried, no longer work the hours, shifts, geographical, and medical assignments at the centralized direction of a New Kensington director of nursing. A nurse now works for a physician and at least one is a part-time supervisor. Thus, on the basis of the record made by Pisano and Altmeyer, the receptionist/aide created by RMG is not merely a combination of prior separate classifications, but the aide does different things than her HMO equivalent. Similarly, a nurse becomes a supervisor. It would appear that, superficially, while the same ultimate medical services are rendered, the job content and job conditions have substantially changed. These are not changes ''in minor respects.'' *Morton Development Corp*., 299 NLRB 649 (1990).

The fact that RMG offers fewer medical services (a vast decrease in medical specialties) and social services (''elder care,'' mental hygiene, etc., have disappeared) does not itself materially affect the nature of the jobs and working conditions, above-described although the changes clearly downsize the new enterprise. But diminution in size and services are not viewed as changes affecting the ''continuity of the enterprise'' for successorship purposes.

On the basis of the above-described post-HMO changes in the RMG, changes in the jobs performed by the RMG employees, and changes in RMG's supervisory, managerial, professional functioning, and staff, as viewed by the new RMG employees, I am constrained to conclude that RMG is not the legal successor of HMO because (1) the businesses are not ''essentially the same''; and (2) the RMG employees are not doing the same jobs, working under the same conditions, under the same supervisors (and supervisory system) as they had as HMO employees. Such basic changes in the business and employee functions and conditions necessarily alter employee expectations of union representation. Absent those evidentiary structural supports, there can be no finding underpinning the mandated legal conclusion of ''substantial continuity'' between the enterprises, as required in *Fall River Dyeing*, supra, 482 U.S. at 43–44. Compare: *Morton Development Corp*., supra.

I draw this conclusion in the face of evidence, carefully adduced by the General Counsel, showing that both enterprises furnish primary health care out of the same physical plant, with a majority of the new RMG employees having been HMO employees, with continued centralized payroll, and bookkeeping, with the physicians being the same (though of reduced number and specialty), and the employees ultimately rendering services of a nature similar to that rendered by HMO employees. The considerable body of evidence adduced by Respondent showing the differences in social and medical services between the two enterprises, the different types of patients (and their methods of payment) drawn by the two enterprises and the formidable differences in the sources and expectations regarding the physicians' incomes and profit-sharing possibilities is less significant. Under the Supreme Court's and Board's admonitions, I have sought to emphasize those factors affecting the view of the employees in their jobs. Those factors concern the substantial alteration of the employer for whom they work, their job situations and the reasonableness of expectations of continued Union representation. *Fall River Dyeing*, supra. The employer changed; the substance of their jobs changed and the job conditions changed.

Having found that a preponderance of the evidence does not support a finding that a successorship relationship existed, it follows that RMG was under no obligation to recognize or bargain with the Union, as the Union otherwise timely requested, within the meaning of Section 8(a)(1) and (5) of the Act. Under these circumstances, it is unnecessary to consider Respondent's other defenses.

CONCLUSIONS OF LAW

1. Respondent, Russelton Medical Group, Inc., is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. RMG, having not been proven to be the successor to HMO of Western Pennsylvania, Inc., is under no obligation to recognize and bargain with the Union within the meaning

[11] Part-time medical aides at RMG sometimes work for independent physicians located in independently leased or RMG subleased facilities.

of Section 8(a)(5) and (1) of the Act pursuant to the Union's timely request therefore made in or about January 1989.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[12]

ORDER

The complaint be dismissed in its entirety.

[12] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.